

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 10 OF 2015
(Arising from Commercial Case No. 14 of 2015)**

EMMANUEL JUSTINE NYERERE t/a MAFUTA DISTRIBUTORS REVINA JOSEPH MHONGE	} APPLICANTS
VERSUS		
I & M BANK (T) LIMITED	RESPONDENT

20th & 23rd October, 2015

RULING

MWAMBEGELE, J.:

The applicants – Emmanuel Justine Nyerere t/a Mafuta Distributors and Revina Joseph Mhonge - are defendants in Commercial Case No. 14 of 2015 in which I & M Bank (T) Limited is the plaintiff. That suit was instituted against them jointly and severally under summary procedure for payment of Tshs. 546,746,529/60 being an outstanding amount due and owing to the plaintiff on account of credit facilities extended to the 1st defendant with interest and other charges thereto. The applicants, through this application, have come to seek leave to defend against the said summary suit. The application has

been made under Order XXXV rule 3 and section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC").

Two affidavits in support of the application were sworn by the first and second applicants Emmanuel Justine Nyerere and Revina Joseph Mhonge. The first affidavit is to the effect that the first defendant had requested from the respondent credit facilities of an overdraft of Tshs. 326,000,000/= and a term loan of Tshs. 124,000,000/= upon which he created a legal mortgage in favour of the plaintiff over his landed properties in Mwanza. It is further stated that the applicant had never created a chattel mortgage and the purported signature on the Chattel Mortgage Deed annexed to the plaint is not his signature and therefore forged. For these reasons, he prays that the prayers in the chamber summons be granted.

The second affidavit which was sworn by the 2nd applicant Revina Joseph Mhonge is to the effect that the applicants are spouses, that they have issues of the marriage, that the 2nd applicant had signed a Guarantee and Indemnity deed as Guarantor of the first applicant to the respondent, that further the 2nd applicant signed Land Form No. 41 titled Mortgage of a Matrimonial Home and further that she signed the said consent deed of matrimonial home without being told by the respondent to obtain an independent legal advice.

A counter affidavit sworn by Clement Kagoye vehemently denies the facts that he had never created a chattel mortgage and strenuously avers that it was created.

When this matter was called on for hearing on 20.10.2015, the learned advocates Mr. Kweka and Mr. Kange appeared before me for the applicants and respondent respectively. I accorded them opportunity to address me on the application. Mr. Kweka had nothing much to add to what is stated in the affidavit but rather reiterated that the applicants had never created the chattel mortgage and as such they should be accorded leave to appear and defend the suit so that they can prove forgery of their signatures on the purported chattel mortgage.

Mr. Kange, on the other hand resisted the application putting firstly that the position of the law is that in order for leave to be granted, two conditions must be satisfied by the applicants. These conditions, according to the learned counsel, are that the applicant must show that the loan was not taken or it was fully recovered. He supported his submission with the decision of this court in the case of ***National Bank of Commerce Ltd Vs Edward Epimack Laswai t/a Laswai Truck & others***, Commercial case no. 115 of 2011 (unreported).

He went on to submit that the question of the signatures being forged should have been reported to the police and therefore it is misplaced in this court and that in terms of paragraph 6 of the counter affidavit the chattel mortgage was created and signed by the applicant. Surprisingly, the learned counsel charged, if the applicants did not sign the said chattel mortgage, then what was the purpose of seeking an amicable settlement of the matter by a letter of the learned counsel for the applicants to the respondent. He finally submitted that the applicants have failed to satisfy the said conditions and prayed that the application be dismissed with costs.

Mr. Kweka, learned counsel for the applicants had nothing much to rejoin on but stressed that the applicants did not sign the chattel mortgage and as such they should be accorded leave to prove the same.

I have subjected the learned counsel's contending views to serious scrutiny they deserve. As rightly pointed out by Mr. Kange, learned counsel for the respondents, as the law stands now, for an applicant to succeed in applications of this nature, he must prove to the satisfaction of the court two things – first that he never took the loan and that he took the loan but has repaid it. This position has been brought into place by the provisions of section 25 (b) of the Mortgage Financing (Special Provisions) Act, 2008 (Act No. 17 of 2008), which amended rule 3 of Order XXXV of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). For easy reference, this provision reads:

"25. The first Schedule to the principal Act is amended in rule 3 of Order XXXV by-

(a) NA;

(b) adding after paragraph (b) of sub-rule (1) the following paragraph:

"(c) in suits arising out of mortgages, where the mortgagor demonstrate that-

(i) **loan or the portion of the loan claimed is indeed discharged;** or

(ii) **loan was actually not taken";**

and

(c) adding after sub-rule (2) the following provision:

"(3) For the purpose of paragraph (c) of sub-rule (1), a mortgagor or an applicant acting on that behalf shall be deemed to have complied with or discharged his responsibility if upon a bank account through which loan was given it is shown that loan is full paid."

[Emphasis supplied].

Failure to satisfy the court on the above ingredients, leave to defend a summary suit will not be granted regardless of how enticing other grounds adduced may be – see the *Laswai* case (supra).

In the instant case, the applicants allege in the main that the signatures on the chattel mortgage were forged. This is a very serious allegation. Despite the fact that the applicant's affidavits do not reveal clearly that the loans were not actually taken, by averring that the signatures in the chattel mortgage were forged and they seek leave to defend the suit so that they can prove the forgery, by implication, I take it that the applicant mean to say that they did not actually take the loan. The allegation of fraud, as already alluded to above, is a very serious allegation. In the premises, I find it apposite to allow the applicants prove that there was forgery in the loan documents under discussion. The fact that they did not report the forgery to the Police, as Mr. Kange alleges, cannot in my view be a bar to the applicants to defend the suit. After all, we are not told anywhere in the pleadings that the applicant never reported the matter to the Police.

In the upshot, the applicants are granted unconditional leave to defend Commercial Case No. 14 of 2015 in which they are sued jointly and severally. The Written Statements of Defence or joint Written Statement of Defence, as the case may be, should be filed within 21 days from today.

Order accordingly.

DATED at MWANZA this 23rd day of October, 2015.

J. C. M. MWAMBEGELE
JUDGE